

## LEGAL REVIEW NOTE

SENATE EDUCATION  
EXHIBIT NO. 2  
DATE 3/15/13  
BILL NO. 8B 374

LC#:LC0254, To Legal Review Copy as of  
February 25, 2013

**Short Title:** Establish public charter schools

**Attorney Reviewers:** Laura Sankey/Todd Everts

**Date:** February 26, 2013

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

#### Legal Reviewer Comments:

LC0254, as drafted, may raise potential constitutional issues associated with Article X of the Montana Constitution. Article X, section 9(3)(a) provides that "There is a board of public education to exercise general supervision over the public school system and other such public educational institutions as may be assigned by law." In its decision in *Board of Public Education v. Judge*, 167 Mont. 261 (1975), the Montana Supreme Court held that the Legislature could not transfer responsibility for vocational education from the Board of Public Education to the State Board of Education. The Court determined the Legislature did not have the authority to alter the structure of the three constitutional boards of education through legislation when the State Board of Education was not intended to have executive or administrative powers other than those associated with planning, coordinating, and evaluating. As drafted, section 4 of LC0254 creates a public charter school commission and gives that commission statewide chartering jurisdiction and authority, while sections 14(1) and 25 exempt public charter schools from the requirements of Title 20 of the MCA, except as explicitly set forth within the provisions of LC0254. A potential issue is whether these provisions conflict with the Board of Public Education's exercise of general supervision of the public school system as specified in Article X, section 9(3)(a).

Another potential issue may arise under Article X, sections 8 and 9(3)(b) of the Montana Constitution. Section 8 states that "The supervision and control of schools in each school district shall be vested in a board of trustees *to be elected* as provided by law." (Emphasis added). Section 9(3)(b) requires members of the Board of Public Education to be appointed by the governor and confirmed by the senate. Under section 4 of LC0254, the public charter school commission is responsible for approving charter school authorizers on the basis of an application process, while section 7 describes the required oversight of approved authorizers by the commission. Under LC0254's section 6, approved charter authorizers are responsible for soliciting, evaluating, and approving charter proposals from qualified applicants. Section 3(6) defines a "governing board" to include "members [who] have been *elected or selected* pursuant to the school's proposal." (Emphasis added). A potential issue is whether the proposed structure of the public charter school system conflicts with the system of governor-appointed, senate-confirmed Board of Public Education members and elected local school board trustees set forth in the Montana Constitution.

**Requester Comments:** None